

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Exclusive Service Contracts for Provision of	)	MB Docket No. 07-51
Video Services in Multiple Dwelling Units and	)	
Other Real Estate Developments	)	
	)	

**LITESTREAM HOLDINGS, LLC'S REPLY COMMENTS**

Gary Resnick  
GrayRobinson, PA  
401 E. Las Olas Blvd.  
Suite 1850  
Fort Lauderdale, FL 33301  
(954) 761-8111  
gresnick@gray-robinson.com

Attorney for Litestream Holdings, LLC

Dated: August 1, 2007

## INTRODUCTION

Litestream Holdings, LLC (“Litestream”) hereby submits its Reply Comments to comments submitted by various parties in this proceeding including but not limited to Verizon, Comcast Corporation (“Comcast”), and AT&T, Inc. (“AT&T”).

### **I. Voiding Litestream's Bulk Contracts Would Destroy Litestream and so Eliminate Competition from the Marketplace.**

As Litestream stated in its Comments, Litestream currently provides the only land-based competition to Comcast in Litestream's service area. Litestream's business is founded upon “Bulk” contracts (which are distinct from “Exclusive” contracts; see below) to provide service to single family communities. These Bulk contracts provide a discount to the homeowners, in exchange for a long-term service agreement, typically negotiated with a homeowners' association. New-build single family home communities require a high level of up-front investment in infrastructure, much more than an apartment complex (“MDU”). While the MSO or incumbent ILEC has the market and financial power to forgo a long-term agreement, in a new-build situation, which by nature requires substantial infrastructure commitment well in advance of significant revenues small competitors like Litestream cannot. The only way small cable operators such as Litestream can compete is if they are able to amortize some of the up-front infrastructure costs over time through a Bulk agreement with a homeowners' association (“Association”).

Litestream's business is founded on Bulk contracts (over 85% of its thousands of subscribers are served under Bulk Agreements), and Litestream has invested capital in up-front costs in reliance on these contracts. If as the Commission is considering, these lawfully negotiated contracts are voided, Litestream would be financially damaged so

broadly it is unlikely to survive. The actions being contemplated by the Commission would have the surely un-intended and anticompetitive consequence of eliminating a small company like Litestream from the market, and so would be inconsistent with the Commission's goals of fostering competition, and requirements to protect small cable providers.

## **II. Bulk Agreements Enable Competition From Small Companies Directly Against Incumbents.**

The major MSO's and ILEC's (the "Incumbents") are in a very different competitive and financial position from the hundreds of small cable and broadband providers ("PCO's"). In many cases, PCO's simply do not and cannot effectively compete head-to-head with Incumbents, because of the market, name recognition, and financial strengths of the latter. Litestream is able to compete directly with Comcast precisely because it can compete for a Bulk agreement. In Litestream's market area, Litestream now provides the only competition to the incumbent MSO (Comcast) to provide service to new communities. The Commission recognized its obligation under the Regulatory Flexibility Act to determine the effect of its proposed rules on small cable operators and to take steps to eliminate such impacts, including but not limited to exempting such small cable operators from such rules.

## **III. Distinction Between Exclusive and Bulk Contracts**

It seems that the Commission in the NPRM may have viewed Exclusive and Bulk contracts as interchangeable. We wish to emphasize for the Commission's attention the distinction between Bulk agreements and Exclusive agreements. Bulk contracts do not and need not prohibit competitive service from new providers; they need not be exclusive. Their essential benefit to a PCO is that they exchange a discount in rate

negotiated by an Association for the benefit of a community for the long-term service agreement with associated cost savings that a small PCO needs to support its infrastructure investment. As Litestream stated in its Comments, nearly all of Litestream's contracts are Bulk agreements. Bulk agreements are lawful arms length negotiations with mutual benefits between the parties, and they do not necessarily exclude other parties offering services in the future. Bulk and Exclusive agreements should not be viewed as interchangeable for purposes of any Commission regulation.

There are also legal differences between Exclusive and Bulk contracts. Congress expressly authorized bulk contracts in the Cable Television Consumer Protection and Competition Act of 1992. Section 523(d) provides, in pertinent part:

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.... Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit.

47 U.S.C. §523(d). Accordingly, federal law expressly authorizes Litestream to enter into Bulk contracts. Courts have recognized the ability of cable operators and Associations to enter into Bulk agreements. See, e.g., Marco Island Cable Inc. v. Comcast Cablevision of the South, Inc., 2007 U.S. Dist. Lexis 16597 (M.D. Fla. 2007); Northview Terrace Association v. Mueller, 2002 Wash. App. LEXIS 584 (Ct. App. (Wash.) 2002). Further, States' laws expressly authorize condominium and other MDUs to enter into Bulk contracts for the provision of cable services and to have such fees treated as common expenses. See, e.g., Section 718.115, Florida Statutes (condominium association may enter into contract for cable or satellite master antenna television system and such expenses shall be a common expense); Section 719.107(1)(b), Florida Statutes

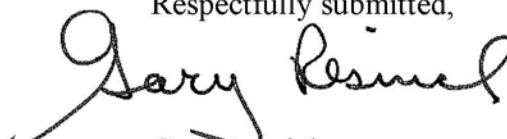
(cooperatives may enter into bulk contract for cable or satellite master antenna television system as a common expense); Section 721.13(3)(j), Florida Statutes (vacation and timeshare plans may enter into bulk cable contracts).

As Litestream pointed out in its Comments, because of States' mandatory access laws such as Florida's, and franchised cable operators' ability to use compatible utility easements in private communities, Bulk agreements not only often do not but in practice cannot exclude any competitor's ability to provide service. Because of the Commission's lack of authority to prohibit Bulk agreements, and the practical, business differences between Exclusive and Bulk contracts, Litestream requests that should the Commission prohibit exclusivity, that it craft its ruling to avoid inadvertently interfering with lawful Bulk agreements, which enable PCO's such as Litestream to offer head-to-head competition with larger providers in the marketplace.

### **Conclusion**

Litestream respectfully requests the Commission to exempt "Bulk" agreements from any regulations it may adopt. These Bulk agreements need not exclude other providers from offering any category of service in the future. Litestream respectfully requests that the Commission recognize the special degree of infrastructure commitment represented by new-build communities, and to continue to allow Bulk agreements in the new-build environment, so that small PCO's such as Litestream can continue to offer competition in the marketplace.

Respectfully submitted,



Gary Resnick

(FL Bar No. 54119)  
GrayRobinson, PA  
401 E. Las Olas Blvd.  
Suite 1850  
Fort Lauderdale, FL 33301  
(954) 761-8111  
gresnick@gray-robinson.com

Attorney for Litestream Holdings, LLC